UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI

Joint Defense Motion
To Allow Meeting of Accused to Develop a Joint Defense Strategy

Khalid Sheikh Mohammed
Walid Muhammed Salih Bin 'Attash
Ali Abdul Aziz Ali

28 August 2008

1. **Timeliness:** This Motion is timely filed within the period prescribed by the Commission's 1 July 2008 Order.

2. **Relief Sought**: The *pro se* accused respectfully request the Military Judge permit said *pro se* accused to meet to discuss the proceedings subject to the same joint defense privilege applicable to counsel.

3. **Overview**: Joint defense agreements are not uncommon in large multi-defendant criminal and civil cases. The accused are seeking the ability to meet and discuss in a privileged setting the proceedings and to gain the benefit of one another's counsel and insight. There is no federal or military case law precluding the accused from engaging in a joint strategy. In fact, the accuseds' argument is supported by their Sixth Amendment rights to present a defense and to self-representation. Further, support for their argument can be found in federal law recognizing a joint defense privilege. Finally, the co-accuseds may be potential witnesses for each other. In order to effectively prepare their defenses, the accuseds require access to each other to conduct interviews to determine whether any co-accused possesses information relevant to any other's defense or sentencing case.

4. **Burden of Proof**: As the moving party, the accuseds bear the burden of proof..

5. **Facts**:

a. This Motion is filed at the behest of the *pro se* accused, Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin 'Attash, and Ali Abdul Aziz Ali.

b. On 5 June 2008, the co-accused were brought before the Commission for arraignment. All five co-accused expressed a desire to waive counsel and proceed *pro se*. The Military Judge deferred the requests of Mr. Al Hawsawi and Mr. Bin al Shibh. These co-accused continue to be represented by counsel.

c. The accused were permitted to communicate with each other in court throughout the arraignment, which lasted approximately seven hours. The accused have been otherwise barred from communicating with each other.

d. During the arraignment, Mr. Mohammed requested permission for the co-accused to speak with each other briefly to make one "joint front." The Military Judge responded that he was unaware of any vehicle under the rules which would allow a joint meeting to occur but suggested that the accused file a motion for his consideration.

e. At his 10 July individual hearing before the Military Judge, Mr. Bin Attash also requested that a joint meeting be permitted: "The judge determined that each of us, myself and my brothers, have made our decision without any pressure or intimidation. And I believe now perhaps it is it should be easy for us to meet each other and consult."

f. Since the arraignment and their *pro se* elections, the accused have not seen or communicated with each other.

g. The accused are charged as co-defendants and a fair reading of the facts alleged leads to the inevitable conclusion that each accused could be witnesses relevant to the cases of their other co-accused, should any accused chose to testify. The accused could also be witnesses against each other should the court find that normal protections of *United States v. Bruton* -- prohibiting the use of a non-testifying co-defendant's statement against another co-defendant – are inapplicable to the Commissions' process.

h. The accused desire to meet together to discuss all aspects of the proceedings in a privileged setting.

i. The *pro se* accuseds assert that a meeting would help them better understand the proceedings against them. All five accuseds joined in D-018 (Motion to Stay the Proceedings Until a Competent Commission Interpreter is Provided) indicating their common difficulties understanding the proceedings. If permitted to meet, the *pro se* accused, who share a common culture and religion, would be able to work together to determine how they can best proceed in light of the Commissions' process.

j. The government has classified the accuseds as "high value detainees" (hereinafter, HVD). Consequently, they have been segregated and detained at "Camp 7." *See, "Pentagon Quiet After Commander Acknowledges Secret Guantanamo Holding Area*, Feb 7, 2008, www.foxnews.com.

6. Law and Argument:

As a threshold matter, the *pro se* co-defendants stand in two distinct positions relative to each other. First, each is co-counsel to the others, necessitating communication regarding case preparation and the possibility of a joint defense. Here, counsel for the represented accused have consented in their joining this meeting. Second,

each is conceptually a witness to acts of the others, necessitating that each *pro se* discover both what the other co-accused have stated in regard to prior questioning and also what the other co-accused might say at any future hearing.

Co-defendants as co-counsel

Defendants elect to enter into joint defense agreements to share work, information and mount a coordinated defense. The presentation of a "joint front" may be the defendant's best hope for success. The hazard to co-defendants of presenting conflicting defenses is obvious on its face. Prudent trial preparation by counsel in any case would include attempting to learn the strategy of co-defendants so as to, if possible, avoid presenting a defense inconsistent with those co-defendants. Defense counsel could elect to enter into a joint defense agreement to avoid this problem. The *pro se* accused should have the same opportunity to investigate and determine the appropriate strategy to pursue in their defenses.

Both the Sixth Amendment and the Military Commissions Act recognize the accused right to self-representation. *See Faretta v. California*, 422 U.S. 806 (1975) and 10 U.S.C. § 949a 9b) (3). As *Faretta* articulated, the defendant's right to waive counsel arises directly from the structure of the Sixth Amendment, which emphasizes the personal nature of the right to counsel:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, the right to self-representation-to make one's own defense personally-is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

422 U.S. at 819.

The *pro se* accused have waived counsel and have come to the conclusion that a meeting is necessary to prepare their defense. Acting as their own counsel, the *pro se* accused are entitled to have their voices heard. Specifically, "[t]he *pro se* defendant must be allowed to control the organization and content of his own defense." *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). Here, the *pro se* accused are considering whether they wish to pursue a joint front, a strategy that counsel would also consider in a complex multi-defendant conspiracy case. The *pro se* accused should not be foreclosed from this strategy based on their self-representation status.

The Sixth Amendment is also the primary source of the *pro se* accused right to present a defense. "'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment," it is by now axiomatic that the Constitution guarantees criminal defendants "'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 126 S.Ct. 1727, 1731 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986)). The right to present a complete defense entitles criminal defendants to discover favorable evidence, *Brady v. Maryland*, 373 U.S. 83 (1963); *Davis v. Alaska*, 415 U.S. 308 (1974); *Kyles v. Whitley*, 514 U.S. 419 (1995), to present evidence, including compelling the attendance of witnesses and production of documents, *Washington v. Texas*, 388 U.S. 14 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Green v. Georgia*, 442 U.S. 95 (1979), and to have their evidence believed. *Cool v. United States*, 409 U.S. 100 (1972).

Consistent with *McKaskle* and the right to present a defense, the accused in this case request the opportunity to meet and develop their own defense, consistent with their values and the message that they wish to present. The Sixth Amendment's respect for individual autonomy demands no less.

The accuseds' position is further strengthened by federal courts' recognition of a joint defense privilege or common interest rule, which protects communications made between parties engaging in a joint defense effort or strategy. *See United States v. Schwimmer*, 892 F.2d 237 (2nd Cir. 1989); *United States v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 28 (1st Cir. 1989). By safeguarding against the disclosure of information, the joint defense privilege encourages co-accuseds to communicate when it is in their interests to do so:

> Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys *and with each other* to more effectively prosecute or defend their claims.

In re Grand Jury Subpoenas, 902 F.2d 244 (4th Cir 1990) (emphasis added).

The scope of the common interest or joint defense privilege as recognized in federal courts is broad, and encompasses situations in which defendants' interests are shared and similar, although not identical; the underlying purpose is ensuring the protection of the privilege of communication. *See, e.g., United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir. 1979); *United States v. Almeida*, 341 F.3d 1318, 1323-1324 (11th Cir. 2003); *United States v. Weissman*, 195 F.3d 96 (2d Cir. 1999); *Morrell v. Local 304A*, 913 F.2d 544, 555 (8th Cir. 1990); In *re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir.

1994); *In re Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990); *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

The foregoing cases demonstrate that the communications requested by the accused are common in complex conspiracy prosecutions. There are also additional factors unique to this case that compel granting the request. First, the accused have been held incommunicado for several years. Given their detention and treatment, they do not trust counsel (particularly uniformed counsel) to represent their interests. Second, the accuseds' faith will be a critical component to their defense. None of the counsel currently identified shares this faith. Understandably, the accuseds are concerned that their position be presented accurately and effectively. This requires allowing them to join together to better understand the proceedings in light of their unique circumstances.

A meeting of standby counsel does not serve the purposes of the accuseds. Standby counsel do not represent the accused and cannot speak to their interests. Each of the accuseds have rejected counsel, thereby limiting their participation. Standby counsel have had particular difficultly establishing any relationship with the accuseds. As their own counsel, they request joint meetings which are necessary for the development of a defense. Pursuant to *McKaskle*, the ability to direct the defense is fundamental to the Sixth Amendment right to self-representation. 465 U.S. at 174. Given the complexity of this situation, meetings between standby counsel cannot constitute an adequate substitute for a joint meeting of the accuseds.

The defense anticipates that the government's primary objection to the meeting will involve security concerns. The fact that this is a capital case must weigh heavily in favor of allowing the meeting..

The Commission possesses the ability to address any security concerns raised by the government. Commission Rules expressly authorize the military judge to regulate the time, place and manner of discovery, including the prescription of "such terms and conditions as are just, "including the issuance of protective and modifying orders. R.M.C. 701(l).

Additionally, it should be noted that the accuseds were already given a limited opportunity to communicate with each other at their arraignment and the government did not object to these communications in this non-privileged setting, where the government stood to benefit. As a matter of due process and fundamental fairness, the accuseds should be permitted to communicate in a privileged setting to advance their interests. Furthermore, it should be noted that governmental concerns of general dissemination of information possessed by the HVDs as expressed in *Hamdan* are absent from this case where everyone is in fact an HVD with extraordinarily restricted access to the outside world.

At the same time, the meeting between co-accuseds must be held in a manner that protects the accuseds' rights of confidentiality and against self incrimination. If absolutely necessary, the accuseds are willing to allow standby counsel to be present at

this meeting. However, the presence of any other personnel, particularly representatives of the prosecution, would violate the federal joint defense privilege as well as their Sixth Amendment and statutory rights to counsel.

Co-defendants as witnesses

The rules of this tribunal require that an accused tried before a military commission shall have "an adequate opportunity to prepare [his] case and no party may unreasonably impede the access of another party to a witness or evidence." R.M.C. 701(j).

Such a rule is consistent with general court-martial practice where Congress has declared:

> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States have criminal jurisdiction may lawfully issue. . .

U.C.M.J. art. 46. *See, e.g., United States v. Mustafa, 22 M.J. 165, 168 (C.M.A. 1986)* (citing Article 46, the court stated: "There can be no question that a military accused is entitled to have equal opportunity with the Government to obtain witnesses to assist him in his defense"). Article 46 implements the accuseds' Sixth Amendment right to compulsory process. *United States v. Davison, 4 M.J. 702, 704 (A.C.M.R. 1977).*

Other Commissions have dealt with the issue of access to other Guantanamo HVD detainees. In the Commissions case of *United States v. Salim Ahmed Hamdan,* counsel for the accused was allowed access to question Mr. Mohammed and Mr. Bin Attash, both through written interrogatories and physical access to meet with Mr. Bin 'Attash and discuss his potential testimony. In reaching its decision on a prosecution request to reconsider its earlier grant of access, the court noted multiple threshold standards for defense requests for access to witnesses to include ""likelihood" and "plausible explanation." *See, Hamdan* , P-004, On Reconsideration, Ruling on Motion for Stay and for Access to High Value Detainees, dated 14 March 2008, at page 2 (the court also noted that in *United States v. Moussaoui*, 382 F. 3d 453 (4th Cir. 2004) the court was satisfied with a "plausible showing."). While Mr. Hamdan was represented by counsel, such access by counsel was deemed permissible and necessary; the pro se accused should be afforded the same opportunity in their self-representation before a capital trial. Here, the justification to interview co-defendant accuseds is apparent on its face.

The joint meeting by the accuseds is reasonable and necessary. Accordingly, the accuseds respectfully request that the Commission grant this motion and permit them to meet jointly for the purposes articulated herein which are consistent with those stated by Mr. Mohammed and Mr. Bin Attash in open court.

7. Request for Oral Argument: The accused request argument.

8. Request for Witnesses: None.

9. Conference with Opposing Counsel: Counsel for the accused have consulted with opposing counsel regarding this motion. Opposing counsel has stated that the prosecution will oppose this motion and the relief sought herein.

10. Attachments: None.

Respectfully submitted,

FOR:_____
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LTC Michael Acuff, JA, USAR
Standby Counsel for Mr. Mohammed
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UNITED STATES OF AMERICA

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KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI

Motion to Join

Joint Defense Motion To Allow Meeting of Accused to Develop a Joint Defense Strategy

Mustafa al Hawsawi

29 August 2008

1. **Timeliness:** This Motion is timely filed.

2. **Relief Sought**: Detailed counsel for Mustafa al Hawsawi respectfully join the request for a meeting to develop a joint defense strategy with the *pro se* counsel. Counsel request the meeting take place with the presence of Mr. al Hawsawi and his detailed counsel.

3. **Facts**:

a. During the 9 July hearing, Mr. al Hawsawi indicated his desire to meet and strategize with the other co-accused. He stated: "That we ask you to your permission to confer among ourselves, the accused" and "When we asked to confer with each other, you refused or you did not comply with our request, there was an opportunity to confer with each other so we could reach some common ground."

b. At the 9 July hearing, Mr. al Hawsawi also indicated he needed more time to make a decision about counsel. As such, detailed military counsel continue to represent him before this Commission.

c. Mr. al Hawsawi remains confined and is unable to speak with the co-accused in this case.

d. The judge, in his order dated 27 August 2008, set a 22 September 2008 hearing date to: "receive evidence and hear oral argument on D-001", "hear oral argument on D-020", address discovery motions and conduct follow-up *voir dire*.

4. Law and Argument:

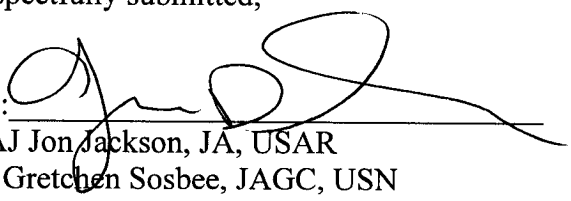
Mr. al Hawsawi re-asserts and incorporates herein by reference the arguments put forth by his co-accused.

Counsel for Mr. al Hawsawi require an opportunity to meet with the other accused who are acting as their own counsel in order to develop a strategy for the next hearing including, but not limited to, anticipated witnesses, strategies for direct and cross examinations, and presentation of evidence.

Counsel for Mr. al Hawsawi further require an opportunity to meet with the *pro se* accused in order to discuss the progression of the trial including, but not limited to, anticipated law motions, anticipated discovery motions and overall litigation strategy.

Mr. al Hawsawi has indicated on the record that he desires to have a joint meeting take place. As he is still represented, his counsel request they be present at such a joint meeting.

Respectfully submitted,

BY: 

MAJ Jon Jackson, JA, USAR
LT Gretchen Sosbee, JAGC, USN
Office of Chief Defense Counsel
Office of Military Commissions
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UNITED STATES OF AMERICA **v.** **KHALID SHEIKH MOHAMMED;** **WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED AL HAWSAWI**	**D-037** **Government Response** to the Joint Defense Motion to Allow Meeting of Accused to develop a Joint Defense Strategy Khalid Sheikh Mohammed Walid Muhammad Salih Bin 'Attash Ali Abdul Aziz Ali 15 September 2008

1. **Timeliness:** This response is filed within the time allowable by the Military Commissions Trial Judiciary Rules of Court. The Prosecution sought and received an extension until 15 September 2008 to file this response.

2. **Relief Sought:** The Government does not object to permitting the pro se accused from meeting to discuss the proceedings.

3. **Burden of Proof:** As the requesting/moving parties, the accused bear the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).

4. **Facts**: No additional facts are required for resolution of this motion.

5. **Discussion**:

a. The Prosecution does not object to allowing a meeting of the *pro se* accused to develop a joint defense strategy, subject to certain logistical restrictions regarding the frequency of the meetings as well as the security provisions that must be put in place. The number of accused who desire to meet will likely dictate the meeting site, however, security concerns will not allow for such meetings without security personnel being present. The Prosecution would not object to the Military Judge issuing a protective order limiting the disclosure of privileged information the guards may hear during the course of their duties, but would request to see a copy of whatever order the Military Judge is contemplating so that the Prosecution can confer with JTF-GTMO to ensure that its security concerns are adequately addressed prior to the order being put in place.

b. The Prosecution proposes that the *pro se* accused who wish the join in this agreement be allowed to meet for a set period of time after the sessions of the court scheduled for the week of 22 September 2008. Due to the extensive security procedures required if it is necessary to move these accused, the Prosecution respectfully requests that any meetings requested on dates separate from the session of the court occur no more than twice monthly.

c. The Prosecution notes that the Military Commissions Act does not require the relief requested, nor, as the Defense alleges, does the 6th Amendment to the Constitution offer a source of rights to these accused for this relief. The three accused who have joined in this motion are alien unlawful combatants without voluntary connections to the United States, and are being held in Guantanamo Bay, Cuba. Under settled Supreme Court doctrine, the accused lacks any claim to the protections of the Bill of Rights. *See generally, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950). However, these legal issues need not be considered by the Military Judge for purposes of this motion as the Prosecution does not object to the requested relief.

d. This Commission informed Mr. Mohammed, Mr. Ali and Mr. bin 'Attash of the difficulties that surround self-representation. They all willingly accepted the challenge with a full understanding of those difficulties; especially those that are caused by their confinement in Guantanamo Bay and their unique status as High-Value Detainees. That they will be more limited in their joint meetings than individuals who are not detained pending trial is one of the realities they have acknowledged.

e. Finally, although it has been mentioned several times by the defense counsel without response by the Prosecution, it is a ridiculous notion to suggest that the Prosecution gave the five co-accused a "limited opportunity" to communicate with each other at their arraignment in open court, or that the government "stood to benefit" by doing so. What occurred at the arraignment of these co-accused is no different than what occurs in joint trials every day in courtrooms across the United States; co-conspirators sitting in a court-room together, alleged to have committed a crime in concert, all sitting within talking range of one another. It is

important to note that all detailed defense counsel were present at the arraignment prior to the accused coming into the court room and none objected to their client's communications with each other. Additionally, detailed defense counsel had ample opportunity to advise these individuals not to speak with one another during the arraignment. The Defense's failure to persuade their clients not to speak with other detainees, or agree to representation by detailed defense counsel, should not cause the Prosecution to be unfairly maligned.

6. **Conclusion:** Although the *pro se* accused are not entitled to a joint meeting under the Military Commission Act, or any other source of law, the Prosecution does not object to a joint meeting of the accused, subject to reasonable time, place and frequency restrictions, provided the security concerns of JTF-GTMO can be addressed.

7. **Request for Oral Argument:** The Government does not request oral argument but reserves the right to respond to any oral argument the defense may make.

8. **Respectfully submitted**,

/S/

Clay Trivett
Prosecutor
Office of Military Commissions

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